

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEAMBRE TABRICE HUCKABY,

Defendant-Appellant.

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UNPUBLISHED

August 21, 2007

No. 265200

Wayne Circuit Court

LC No. 05-003213-01

Before: Davis, P.J., and Schuette and Borrello, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317, assault with intent to do great bodily harm less than murder, MCL 750.84, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent prison terms of 18 to 30 years for the murder conviction, two to ten years for the assault conviction, and a consecutive two-year term for the felony-firearm conviction. He appeals as of right. We affirm.

I

Defendant's convictions arise from a shooting at his Detroit home on January 3, 2005. Complainant Cynthia Jessie testified that defendant is her cousin and the decedent is her husband. On the day of the incident, the decedent attempted to contact defendant by phone numerous times because defendant owed the decedent money. At 11:45 p.m., the complainant and the decedent drove to defendant's house and the complainant repeatedly rang the doorbell and knocked on the door. The decedent was standing directly in front of the door and looking through a small window near the top of the door. The complainant heard four or five gunshots. The complainant "assume[ed]" defendant shot the decedent because the decedent indicated that defendant was coming to the door. The decedent was shot in the thigh and the complainant drove him to the hospital.

According to medical personnel, the decedent arrived at the hospital in hemorrhagic shock, unable to breathe on his own, without a pulse and with a "through and through" gunshot wound in his left thigh. After the decedent was resuscitated, his wound was surgically repaired and he was released from the hospital. Approximately three weeks later, the decedent died from blood clots in his lungs. The assistant Wayne County medical examiner testified that blood clots within the posterior tibia vein, which is a lower portion of the femoral vein injured by the

gunshot wound, dislodged, traveled through the circulation and blocked the blood flow to both lungs. She further testified that the “cause of death was a gunshot wound to the left leg, complicated by a pulmonary embolus.”

Both the decedent’s daughter and son testified that they maintained close family relations with defendant. The decedent’s daughter testified that after the incident, defendant apologized and said that he did not know that the decedent was the person knocking on his door. The decedent’s son testified that defendant told him that he was in the basement with company and heard banging on the door. He “thought someone was breaking in, so he got his assault rifle and he shot through the door.” Defendant gave the decedent’s son money for the decedent’s funeral.

At trial, the defense counsel asserted that defendant was not the shooter, that the shooting did not occur on defendant’s front porch,<sup>1</sup> and that the decedent’s cocaine use caused the blood clots that caused his death. Defendant did not testify. Trial counsel read into evidence a written statement that the decedent made to a police officer on January 7, 2005, in which the decedent denied knowing defendant or who lived at the address where he was shot. The decedent claimed that he was told to meet a person at a house to retrieve money, but he was not sure if he was at the right house. In rebuttal, the decedent’s son testified that the decedent knew defendant, that he was with the decedent and defendant on several occasions, that they all shared a house at one point, that he had been with the decedent at defendant’s house, and that the decedent did not want the police to know that defendant was the shooter.

## II

Defendant first argues that there was insufficient evidence to sustain his conviction of second-degree murder. We disagree.

When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). Circumstantial evidence and reasonable inferences arising from the evidence can constitute satisfactory proof of the elements of the crime. *People v Truong (After Remand)*, 218 Mich App 325, 337; 553 NW2d 692 (1996). This Court will not interfere with the trier of fact’s role of determining the weight of evidence or the credibility of witnesses. *Wolfe, supra* at 514. Rather, “a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict.” *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). The elements of second-degree murder are “(1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse.” *People v Aldrich*, 246 Mich App 101, 123; 631 NW2d 67 (2001) (citation omitted).

Defendant challenges only the finding that the decedent’s death was caused by his actions. He contends that the decedent’s use of cocaine was an intervening cause of the

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<sup>1</sup> A police officer testified that there were seven suspected bullet holes or bullet strikes in defendant’s door, but there was no glass, bullets, shell casings, or blood on the porch.

decedent's death. A defendant's conviction may be sustained only "where there is a reasonable and direct causal connection between the injury and death." *People v Flenon*, 42 Mich App 457, 460; 202 NW2d 471 (1972). "The determination of proximate cause or of the existence of an independent intervening cause of death is an issue for the [trier of fact]." *People v Herndon*, 246 Mich App 371, 399 n 62; 633 NW2d 376 (2001) (citation omitted).

Viewed in a light most favorable to the prosecution, a rational trier of fact could find that the decedent's death was caused by defendant's act of shooting him. Evidence was presented that defendant intentionally fired a gun several times through his front door, knowing that a person was on the other side. The decedent was struck in his left thigh in a major artery and vein and suffered "active hemorrhage." There was medical testimony that, without medical treatment, the decedent would have immediately died from the injuries sustained from the gunshot wound. Although the wound was surgically repaired and the decedent was released from the hospital, he died three weeks later. The medical examiner, who was qualified as an expert in forensic pathology, concluded that the "cause of death was a gunshot wound to the left leg, complicated by a pulmonary embolus." In explaining the cause of death, the medical examiner indicated:

The section of his lower leg had revealed blood clots within a deep vein called the posterior tibia vein. Actually it's just the same vein that had been injured by the gunshot wound, it just changes names further down the way. And some of this blood clot had dislodged and it traveled through circulation and blocked the blood flow to both of his lungs, that term is called pulmonary embolus. And when that occurs the individual just literally drops dead, dies suddenly. So his immediately [sic] cause of death was a pulmonary embolus, that was due to the gunshot wound to the left leg.

Although the decedent's autopsy and toxicology results showed that the decedent had ingested cocaine "within four hours before of his death," there was no evidence of any causal connection between the decedent's death and cocaine use. To the contrary, the medical examiner unequivocally testified that the decedent's cocaine use did not contribute to his death and had "[n]othing to do with it." She further testified that the manner in which the decedent used cocaine "is not associated with the formation of blood clots" "[i]n any way."<sup>2</sup> Likewise, the treating physician testified that cocaine was not a factor in the decedent's death and agreed "there's no absolute association between cocaine use and formation of blood clots." From this evidence, the jury could reasonably conclude that defendant's act of shooting the decedent with an assault rifle caused the decedent's death. The evidence was sufficient to sustain defendant's conviction of second-degree murder.

### III

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<sup>2</sup> Decedent apparently had a history of consuming crack cocaine in a pipe and injecting cocaine into his skin, but there was no evidence that decedent injected cocaine into his veins. In any event, there was no evidence presented to show that intravenous injection of cocaine would have increased the likelihood of, or the likely susceptibility to, blood clots.

Defendant next argues that he is entitled to a new trial because the trial court failed to sua sponte instruct the jury on involuntary manslaughter, and the trial court failed to provide more extensive instructions on cause of death and intervening cause of death. We decline to review defendant's challenge to the jury instructions because the record reflects that trial counsel expressed satisfaction with the trial court's instructions. Defendant's affirmative approval of the instructions waived any error. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000); *People v Ortiz*, 249 Mich App 297, 311; 642 NW2d 417 (2001).

#### IV

Defendant also argues that the trial court abused its discretion by denying his motion for a new trial, which was based on defendant's claim that he was denied the effective assistance of counsel at trial. We disagree.

This Court reviews a trial court's decision denying a motion for a new trial for an abuse of discretion. *People v Crear*, 242 Mich App 158, 167; 618 NW2d 91 (2000). Whether defendant was denied effective assistance of counsel is a mixed question of fact and constitutional law; we review the trial court's factual findings for clear error, and its constitutional determinations de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing norms and that the representation so prejudiced the defendant that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Id.* A defendant must also overcome the presumption that the challenged action or inaction was trial strategy. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996).

##### A. Failure to Advance the Defense of Accident

Defendant argues that trial counsel was ineffective for failing to argue the defense of accident and, instead, presenting a defense of mistaken identity. "A defendant is entitled to have his counsel prepare, investigate, and present all substantial defenses." *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). A defense is substantial if it might have made a difference in the outcome of the trial. *Id.*

At a *Ginther*<sup>3</sup> hearing, both defendant and trial counsel testified that defendant had retained trial counsel to represent him in three previous matters, and in each case defendant pleaded guilty to lesser offenses and was pleased with trial counsel's representation. Trial counsel testified that, in this case, he had "many meetings" and discussions with defendant and defendant's wife regarding the charges, defendant's prior record, possible defenses, and whether defendant would testify. In discussing the defense strategy, trial counsel indicated that because

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<sup>3</sup> *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

defendant was a third or fourth habitual offender, defendant could be charged for simply discharging a weapon and that defendant wanted to “beat the charge” and “not return to prison.” Trial counsel testified that after discussions, they chose to argue that the prosecution could not establish beyond a reasonable doubt that defendant was the person who discharged the weapon, and that the decedent’s own drug use caused his death. With regard to the decedent’s children’s testimony, trial counsel planned to argue bias and impeach their testimony. Trial counsel testified that defendant agreed with the defense strategy and never expressed any disagreement. Trial counsel further testified that the defense of accident was inapplicable because defendant intended to discharge the weapon through the door.

Defendant testified that he advised trial counsel that he had an earlier “road rage” incident and thought that the driver was breaking into his home. After hearing banging and giggling at the front door and window, he shot through the lower portion of the door two or three times to scare the possible intruder. Defendant acknowledged that he and trial counsel discussed the defenses of mistaken identity and cause of death. He claimed that he disagreed with those defenses and wanted to admit the shooting and argue that it was a mistake, but trial counsel discouraged him by indicating that he would probably be imprisoned for life if he admitted the shooting. Defendant testified that he eventually deferred to counsel’s judgment.

Accepting defendant’s testimony as true, the record shows that he chose to follow trial counsel’s advice regarding which defenses to assert. Further, defendant cannot demonstrate that trial counsel’s actions deprived him of a substantial defense. *Kelly, supra*. As noted by trial counsel, given defendant’s explanation of the events, the defense of accident was not applicable. At the hearing, defendant testified that he intentionally shot through the front door knowing that someone was on the other side of the door. These facts do not correspond with a defense of accident. See CJ12d 7.1. Furthermore, a defense of accident conflicted with the defense of misidentification argued at trial. Although trial counsel could have presented a defense that was inconsistent with this theory of the case, *People v Lemons*, 454 Mich 234, 245; 562 NW2d 447 (1997), defendant has presented no evidence that trial counsel’s decision in this regard was not reasonable trial strategy. “This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel’s competence with the benefit of hindsight.” *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999).

Defendant also argues that trial counsel should have known that the defense of mistaken identity would not have been successful. To the extent that defendant relies on the fact that trial counsel’s argument was not successful, nothing in the record suggests that trial counsel’s presentation of the argument was unreasonable or prejudicial. Counsel’s decision about how to present his argument to the jury was a matter of trial strategy. “The fact that defense counsel’s strategy may not have worked does not constitute ineffective assistance of counsel.” *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996). Consequently, defendant has failed to demonstrate that there is a reasonable probability that, but for counsel’s alleged inaction, the result of the proceeding would have been different. *Effinger, supra*.

#### B. Denial of the Right to Testify

Defendant also asserts that trial counsel was ineffective by depriving him of his right to testify. A criminal defendant has a fundamental constitutional right to testify at trial. US Const, Am XIV; Const 1963, art 1, §§ 17, 20. At the hearing, defendant testified that he advised trial

counsel “numerous times” that he wanted to testify at trial. Defendant indicated that he wanted to testify that he shot the decedent, but the shooting was a mistake. Defendant explained that trial counsel “led [him] on” to believe that he would be testifying at trial, but never called him as a witness. Defendant claimed that after the defense rested, he again asked trial counsel if he could testify. Trial counsel allegedly said, “not to worry the case was beat.” In contrast, trial counsel testified that he and defendant discussed defendant testifying, and that defendant did not ask to testify but unequivocally stated that he did not want to testify “under any circumstances.”

This issue involves a question of credibility, and the trial court found trial counsel’s testimony to be more credible. Recognizing the superior ability of the trial court to judge the credibility of witnesses who appear before it, we defer to the trial court’s conclusion that trial counsel’s version of events was more believable and that defendant told him that he did not want to testify. See MCR 2.613(C) and *People v Farrow*, 461 Mich 202, 209; 600 NW2d 634 (1999) (a court’s “resolution of a factual issue is entitled to deference,” especially where it “involves the credibility of witnesses whose testimony is in conflict.”). Accepting trial counsel’s testimony as true, defendant never informed trial counsel that he wanted to testify. Consequently, defendant failed to establish that trial counsel was constitutionally ineffective for failing to call him to testify. Defendant cursorily notes that there was no on-the-record waiver of his right to testify; however, none is required. *People v Harris*, 190 Mich App 652, 661-662; 476 NW2d 767 (1991); *People v Simmons*, 140 Mich App 681, 684; 364 NW2d 783 (1985).

### C. Lesser Included Offenses

Defendant also argues that trial counsel was ineffective for failing to request jury instructions on the lesser offenses of manslaughter and reckless discharge of a firearm. At the hearing, trial counsel testified that he mentioned the option of lesser offenses, but defendant did not want to discuss any charge that “was going to send him to prison, particularly saying he had a gun.” Trial counsel indicated that it was perfectly clear that the defense was “only pursuing a not guilty verdict,” “complete exoneration,” “never any lesser,” and no defense that might include a lesser offense. In contrast, defendant denied that there was any discussion of lesser offenses.

Here, the trial court again found trial counsel’s testimony to be more credible, establishing “that the defendant was informed . . . on at least two occasions, as to the possible lesser offenses” and that defendant wanted “a full and complete acquittal.” We defer to the trial court’s credibility assessment in this regard. See MCR 2.613(C). Although defendant claims that he was never informed of the possibility of lesser offenses, he did not argue that he would have agreed to assert those lesser offenses. Moreover, as previously noted, the defense strategy was to argue that defendant was not the shooter and had been erroneously identified. Trial counsel’s decision to pursue this defense, and not request other instructions, was not “below an objective standard of reasonableness under prevailing norms,” *Effinger, supra*, and falls within the purview of trial strategy. *People v Sardy*, 216 Mich App 111, 116; 549 NW2d 23 (1996); *People v Nickson*, 120 Mich App 681, 687; 327 NW2d 333 (1982) (“The decision to proceed with an all or nothing defense is a legitimate trial strategy.”). We will not second-guess counsel in matters of trial strategy, and the fact that the strategy chosen by trial counsel did not work does not constitute ineffective assistance of counsel. *Stewart, supra*. The trial court did not abuse its discretion by denying defendant’s motion for a new trial on the basis that he was denied the effective assistance of counsel at trial.

Affirmed.

/s/ Alton T. Davis

/s/ Bill Schuette

/s/ Stephen L. Borrello